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No. 07-

IN THE

Supreme Court of the United States

FIVE STAR PARKING,

Petitioner,

v.

UNION LOCAL 723, affiliated with the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Five Star Parking filed a complaint in the United States District Court for the District of New Jersey challenging an arbitration award in favor of Respondent Local 723, Affiliated with the International Brotherhood of Teamsters that found that Petitioner's imposition of a wage after bargaining to an impasse in reopener negotiations was a violation of their collective bargaining agreement. The District Court vacated the award on December 20, 2005, finding that the arbitrator had exceeded his jurisdiction by deciding issues of unfair labor practices governed by the National Labor Relations Act and under the jurisdiction of the National Labor Relations Board. Respondent appealed to the Third Circuit Court of Appeals, which reversed the District Court's decision and reinstated the arbitrator's award.

The question presented is this:

When parties to a collective bargaining agreement, negotiating mandatory terms of bargaining pursuant to an economic reopener provision in the agreement, reach an impasse, is the employer's decision to implement its final offer on impasse a right that is governed by the National Labor Relations Act and falling under the primary jurisdiction of the National Labor Relations Board, where the reopener provision in agreement does not make such implementation subject to arbitration?

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Five Star Parking, has no parent corporation and no publicly held company owns 10% or more of its stock.

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Five Star Parking ("Five Star") respectfully petitions that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered on July 24, 2007, in order to resolve a conflict between the D.C. Circuit, the Tenth Circuit and the First Circuit on the one hand and the Third Circuit and the Eighth Circuit on the other. The Eighth Circuit and now the Third Circuit have held that the Employer's ability to unilaterally impose its last offer after an impasse in reopener negotiations is an arbitrable contractual question. The D.C. Circuit and the Tenth Circuit have held that under the National Labor Relations Act (the "NLRA") an employer has a right to implement its final offer in reopener negotiations. And the First Circuit has held that disputes over the right to implement a final offer after an impasse in negotiations over new or renewal agreements are not arbitrable because that right arises under the NLRA and thus falls under the primary jurisdiction of the National Labor Relations Board (the "NLRB"). The Court is presented with a holding that an arbitrator's jurisdiction pursuant to a rights arbitration clause includes determining whether an impasse has been reached in reopener negotiations. This Court should resolve this important question of federal labor law.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is dated July 24, 2007, and it is not published in the Federal Reporter, but is published at *Five Star Parking v. Union Local 723*, No. 06-2012, Slip Copy, 2007 WL 2110716 (3d Cir. July 24, 2007) (the "Third Circuit Decision") (App. 1a). The opinion of the District Judge William J. Martini, United States District Court for the District of New Jersey is dated December 23, 2005, and it is not published in the Federal Reporter, but is published at *Five Star Parking v. Union Local 723*, No. 05-cv-3975, 2005 WL 3502936 (D.N.J. Dec. 23, 2005) (the "District Court Decision") (App. 13a). The order of the Third Circuit denying the Petition for Rehearing or Rehearing En Banc was issued on August 29, 2007. (Aug. 29, 2007 Order, App. 65a). The arbitration award reviewed by the District Court and Third Circuit in this matter was issued on August 3, 2005. Opinion and Award in the Matter of the Arbitration Between Five Star Parking and IBT Local 723 (Aug. 3, 2005) (App. 21a)

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on July 24, 2007. (App. 1a). A Petition for Rehearing and for Rehearing En Banc was timely filed, and was denied on August 29, 2007. (App. 65a). Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 8 of the National Labor Relations Act, 29 U.S.C. § 158 states:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title.
>
> * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

* * *

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period

of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

* * * *

STATEMENT OF THE CASE

Five Star and Local 723, Affiliated with the International Brotherhood of Teamsters (the "Union") are parties to a collective bargaining agreement, effective August 1, 2002 through July 31, 2008 (the "CBA"). The CBA pertains to Five Star operations at Newark Airport for which Five Star employs, and the Union represents, cashiers, attendants and lot checkers. Five Star is an employer in an industry affecting commerce, as defined in Sections 501(1) and (3) and 2(2) of the National Labor Relations Act (the "NLRA") (29 U.S.C. § 142(1), (3) and 29 U.S.C. § 152(2)), and within the meaning of Section 301 of the NLRA (29 U.S.C. § 185). The Union is a labor organization representing employees in an industry affecting commerce, as defined in Sections 501(1), (3) and 2(5) of the NLRA (29 U.S.C. § 142(1), (3), and 29 U.S.C. § 152(5)), and within the meaning of Section 301 of the NLRA (29 U.S.C. § 185).

The CBA sets forth a grievance procedure, including provisions establishing specific jurisdictional standards for arbitration. Article 4 of the CBA allows either party to submit to arbitration any disputes "involving or concerning the meaning, interpretation, operation, or application of any clause of" the CBA. The CBA limits the jurisdiction of the arbitrator to "the particular dispute in question" and provides that the arbitrator

"shall not have jurisdiction or authority to add to, modify, detract from, or alter in any way the provisions of this Agreement or any amendment or any supplement thereto." (CBA Art. 4 at 2-3, *see* App. 23a). There are no provisions in the CBA that give an arbitrator jurisdiction to decide issues outside of the CBA. There are no provisions in the CBA that give an arbitrator jurisdiction to decide issues under the NLRA, such as whether an "impasse" has occurred.

The CBA sets wage rates for the time period from August 1, 2002 until July 31, 2004. The CBA does not set wage rates for the period from August 1, 2004 through the expiration of the CBA on July 31, 2008. The CBA also contains a reopener provision that allows either party, by giving written notice, to reopen the terms of the CBA "solely for the purpose of renegotiating concerning wages and monetary fringe benefits, but for no other purpose." On June 18, 2004, the Union gave Five Star notice of wage reopener bargaining pursuant to the reopener provision. Five Star agreed to negotiate with the Union and the parties commenced a series of negotiations concerning wage rates.

Five Star proposed a 12-and-one-half percent (12.5%) reduction in wage rates, explaining that operational costs necessitated the downward wage adjustment. The Union rejected the offer. Negotiations continued. The Union demanded confidential financial data from Five Star covering all Five Star facilities (not limited to Newark Airport). Five Star made financial information concerning Newark Airport available to the Union but declined to provide data for facilities other than Newark Airport. The Union refused to continue

participating in the negotiations and purported to withdraw its request for wage reopener. Having rejected Five Star's proposal at several meetings and through correspondence, the Union never changed its position or exhibited any willingness to alter its position on wage rates or even to engage in further discussions. Five Star determined that the parties had reached an impasse and implemented its last and final offer, the 12.5% wage rate reduction, on September 17, 2004.

The Union submitted the alleged unfair labor practice charge to the National Labor Relations Board (the "NLRB"). The Union withdrew its charge before the NLRB.

The Union then invoked the grievance procedure of the CBA and pursued arbitration. From the outset of the arbitration, Five Star maintained that the arbitrator lacked jurisdiction to decide issues under the NLRA. Five Star specifically stated that the arbitrator lacked jurisdiction to decide the question of whether an "impasse" occurred.

The Award was issued on August 3, 2005. While in some parts of the Award, the arbitrator disclaimed any authority or intention to determine the issue of "impasse," the text of the award and the issue decided make clear that the only issue determined in the arbitrator's opinion was that no "impasse" existed under the NLRA. After stating this labor-law determination, the Award simply declares in conclusory terms that Five Star breached the CBA, never identifying any provision of the CBA that Five Star allegedly violated.

On August 11, 2005, Five Star filed in the District Court a Complaint and a motion to vacate the Award. On December 20, 2005, the District Court issued an Order granting Five Star's motion to vacate the Award, denying Five Star's motion for attorneys' fees, and denying the Union's motion in its entirety, on the grounds that the "arbitrator exceeded his jurisdiction" by "fail[ing] to ground his decision in any provision of the CBA." (App. 17a-18a). The District Court found that the arbitrator had based his decision entirely on whether an impasse had been reached and not on a construction of any term or provision of the CBA, and that whether an impasse had been reached was a question of federal labor law to be decided by the NLRB. (App. 17a-19a).

The Union filed a notice of appeal to the Third Circuit on January 19, 2006. The Third Circuit issued an opinion on July 24, 2007 reinstating the arbitrator's award. (App. 12a). The Third Circuit decision held that the arbitrator had the authority to determine whether an impasse existed. (App. 10a-12a). A timely petition for Panel Rehearing and Rehearing En Banc was denied on August 29, 2007. (App. 65a-66a).

This Court should now consider the Petitioner's claim that a CBA that allows for rights, but not interest, arbitration does not permit an arbitrator to decide whether an impasse has been reached in economic reopener negotiations. The Court is now presented with the opportunity to clarify the law attendant to reopener negotiations and the arbitrability of disputes that arise thereunder.

REASONS FOR GRANTING THE PETITION

The Third Circuit Decision highlights a disagreement among the Circuit Courts of Appeals on several issues related to the arbitrability of disputes concerning economic reopener negotiations. The D.C. Circuit and the Tenth Circuit, as well as the NLRB, have held that when an employer and a union negotiate pursuant to an economic reopener provision in the CBA, the NLRA allows the employer to unilaterally implement its final offer after bargaining to a good faith impasse. *Local Union No. 47, Int'l Bhd. of Elec. Workers v. N.L.R.B.*, 927 F.2d 635, 643-644 (D.C. Cir. 1991); *Colorado-Ute Elec. Ass'n, Inc. v. N.L.R.B.*, 939 F.2d 1392, 1404 (10th Cir. 1991). The First Circuit has held that after negotiating over new or renewal agreements to an impasse, the employer's right to implement is not arbitrable because it falls under the jurisdiction of the NLRB. *Newspaper Guild of Salem, Local 105 of the Newspaper Guild v. Ottaway Newspapers, Inc.*, 79 F.3d 1273, 1283-84 (1st Cir. 1996).

In contrast, the Eighth Circuit in *General Drivers and Helpers Union, Local No. 554 v. Mid-Continent Bottlers, Inc. (Omaha Division)*, 767 F.2d 482, 485 (8th Cir. 1985), and the Third Circuit in this case, both held that the operation of reopener agreements and the remedies thereunder arise from the CBA and are arbitrable.

A. Decisions of the First, Tenth and D.C. Circuits Hold That An Employer's Right to Implement After An Impasse In Reopener Negotiations Arises from the NLRA and Is Not Arbitrable

1. Decisions of the United States Supreme Court Define the Rights of Parties after an Impasse is Reached in Negotiating a CBA

This Court has held that when parties negotiate mandatory terms of a new or renewal CBA to a good faith impasse, the NLRA grants the employer the right to unilaterally implement its last offer. *See, e.g., Litton Fin. Printing Div., A Div. of Litton Bus. Sys., Inc. v. NLRB*, 501 U.S. 190, 198 (1991) (employer may unilaterally implement after impasse when negotiating a replacement for an expired CBA); *NLRB v. Katz*, 369 U.S. 736, 745 (1962) (employer may unilaterally implement after impasse when negotiating the terms of an initial CBA). This Court has also held that when an impasse has been reached in reopener negotiations, the Union retains its right to strike unless the CBA expressly waives that right. *NLRB v. Lion Oil Co.*, 352 U.S. 282, 293-294 (1957). However, this Court has not yet extended its decision in *Lion Oil* to its logical conclusion that when parties to a CBA negotiating pursuant to a reopener provision reach a good faith impasse, both parties retain all of their economic weapons including the employer's right to unilaterally implement its final offer.

2. Decisions of the D.C. Circuit and the Tenth Circuit Hold that the Right to Implement at Impasse Arises from the NLRA

In *International Brotherhood of Electrical Workers*, the D.C. Circuit extended the holding of *Lion Oil* to include the rights of employers. It held that an employer's right to implement its final offer after an impasse in reopener negotiations arises from the NLRA and that in order to waive that right, the CBA must evidence a "clear agreement" to preclude the use of such "economic leverage." 927 F.2d at 642-644.

In that case, an employer and union entered into negotiations pursuant to a wage reopener provision in their CBA, and after reaching an impasse, the employer implemented its final offer. *Id.* at 639-40. After the union filed an unfair labor practice complaint, an administrative law judge ("ALJ") and the NLRB both found that the employer had a right, under Section 8(d) of the NLRA, that after an impasse in reopener negotiations the parties could resort to any of the economic weapons available to them when bargaining for a new or renewal agreement, including the right to lock-out, strike, or unilaterally implement final offers. *Id.* On appeal to the D.C. Circuit Court of Appeals, the union argued that the contractual language of the reopener provision precluded the right to implement. *Id.* at 643. The union pointed to the language of the reopener which provided for reopening "only for the purpose of negotiating ... changes" and that "[a]greement reached as a result of such reopening shall become effective as of January 1." *Id.* The union argued that because the provision required "negotiating" and

provided for an effective date for the subsequent "agreement", the reopener provision merely allows the renegotiation of terms "while leaving the existing terms and conditions fully effective until mutual agreement on a modification is reached." *Id.* at 643-44. The D.C. Circuit disagreed with the union and upheld the orders of the ALJ and NLRB.

The D.C. Circuit found that "the employer's obligation to bargain over a reopened wage term carries with it the right to implement a final wage offer upon genuine impasse" and that "curtailing the right . . . 'would turn reopener bargaining into little more than a ***charade*** that would barely differentiate it from the kinds of discussion that may lawfully occur even in the absence of a reopener.'" *Id.* at 644 (quoting *Speedrack, Inc.*, 293 N.L.R.B. No. 128, at 4-5 (May 17, 1989) (emphasis added)). The D.C. Circuit drew a distinction between the discussions that parties can engage in throughout the course of their relationship and negotiations pursuant to a reopener provision that are governed by the NLRA. The D.C. Circuit followed the reasoning of the NLRB in *Speedrack*, which in turn followed the reasoning of this Court in *Lion Oil*. *Id.* at 642-45. In *Lion Oil*, this Court construed the term "expiration date" in Section 8(d)(1) and (4) of the NLRA as applying both to expiration of fixed-term contracts and to date on which the terms of a contract are opened pursuant to a reopener provision. *Lion Oil*, 352 U.S. at 289-90. The NLRB in *Speedrack*, relied on that construction to find that when a reopener provision is invoked, the CBA is effectively terminated with respect to the reopened terms and the parties may then resort to the same economic weapons available to them when bargaining a new or renewal agreement.

Speedrack, 293 N.L.R.B. No. 128, at 2. The D.C. Circuit adopted the NLRB's presumption that reopener bargaining is the functional equivalent of bargaining in the absence of a contract with respect to the reopened terms, and as such, the parties retain the same leverage.

In *Colorado-Ute*, the Tenth Circuit also held that an employer's right to implement its final offer after reaching a good faith impasse in reopener negotiations arises from the NLRA. 939 F.2d at 1404-05. In that case, after bargaining to an impasse in reopener negotiations the employer implemented its final offer and the union initiated a strike. *Id.* at 1398-1400. The parties continued to bargain after the impasse and the union then filed a complaint alleging that the employer had violated Section 8(a)(5) of the NLRA by, *inter alia*, "unlawfully implementing the terms of its wage offer during negotiations." *Id.* The ALJ found that the employer acted within its rights, but the NLRB found that though the employer had the right to implement at impasse, that the substance of this final offer was one that could not be implemented unilaterally. *Id.* at 1399-1400.

The Tenth Circuit reversed, finding that there were no such restrictions on an employer's right to implement on impasse. *Id.* at 1403-05. Further, it found that the right to implement arose from the NLRA, limited only by the NLRA's requirement that the employer bargain in good faith. *Id.* at 1404, 29 U.S.C. § 158(d). The Tenth Circuit's decision not only held that the employer has the right to implement at impasse in reopener negotiations and that the right arises from the NLRA, but also that operation of that right—whether negotiations were in good faith—is also governed by standards set by the NLRA. *Id.* at 1404-05.

3. Decisions of the First Circuit Hold that the Right to Implement at Impasse is Not Arbitrable

While the decisions of the D.C. and Tenth Circuits discussed above establish the right to implement after an impasse in reopener provisions, they do not address the arbitrability of disputes over those rights or over the operation of reopener provisions in general. However, "[i]t is well-settled that the NLRB enjoys primary jurisdiction over disputes involving unfair labor practices. . . ." *Ottaway Newspapers*, 79 F.3d at 1283. The First Circuit has held, in a dispute involving negotiating a renewal CBA, that a dispute over the right to implement at impasse was not arbitrable because it arises solely from the NLRA and not from the CBA itself. *Id.* at 1283-1284.

In *Ottaway Newspapers*, the parties negotiated a renewal to an expired CBA. *Id.* at 1275-76. After an underwhelming employer proposal that included proposed layoffs, the union filed a demand for arbitration with the American Arbitration Association, a complaint in the U.S. District Court for the District of Massachusetts seeking an order to compel arbitration, and an unfair labor practice complaint with the NLRB. *Id.* at 1276. The District Court denied the union's request because no layoffs had been made and stated that if layoffs were made after the conclusion of negotiations, that could constitute an unfair labor practice under the jurisdiction of the NLRB. *Id.* A week after the District Court's decision, the union appealed to the First Circuit. *Id.* at 1277. A week after the appeal, the employer declared an impasse and stated an intent to implement its last offer.

Id. The union then amended its complaint with the NLRB to challenge the unilateral implementation by the Employer. *Id.*

On appeal, the union argued that pursuant to a rights arbitration provision, an arbitrator could determine the scope of negotiations over a renewal agreement. In doing so, the union contended, "the arbitrator would not be dictating the terms of the successor agreement; instead it would be determining whether [a provision governing negotiating successor agreements] imposes an obligation to negotiate in good faith." *Id.* at 1280-81. The First Circuit disagreed, finding that there is no "meaningful distinction" between arbitrating the scope of negotiations and arbitrating the terms. Both are interest arbitration. *Id.* at 1281. The First Circuit went on to hold that questions of whether an impasse had been reached and whether the employer bargained in good faith arise all "fall squarely within the NLRB's primary jurisdiction as they are essentially extra-contractual claims" that arise under the NLRA. *Id.* at 1285.

B. Decisions of the Eight Circuit Hold that the Right to Implement at Impasse arises from the CBA and is Arbitrable

The Eighth Circuit, alternatively, has found that implementation at impasse is a creature of the CBA, and, as such, is arbitrable. *See, e.g., Mid-Continent Bottlers*, 767 F.2d at 485; *Bricklayers and Allied Crafts Union, Local No. 4 of Minn. v. Associated General Contractors of Minn.*, 711 F.2d 90 (8th Cir. 1983). In *Mid-Continent Bottlers*, the parties reached an impasse after negotiating pursuant to a reopener provision. *Id.* at 484.

After the employer unilaterally implemented its final offer, the union brought an action for breach of the contract in the U.S. District Court for the District of Nebraska. *Id.* After the District Court's decision in favor of the union, the employer appealed, claiming that District Court lacked jurisdiction because the claim was subject to a broad rights arbitration provision in the CBA. *Id.* The Eighth Circuit agreed with the employer that the right to implement "existed under the contract" and "presented a controversy over interpretation of or adherence to the bargaining agreement." *Id.* at 485. In allowing an arbitrator to address the employer's implementation after impasse, the Eighth Circuit did not once mention the NLRA.

In *Laundry, Dry Cleaning & Dye House Workers Int'l Union, Local 93 v. Mahoney*, after the parties negotiated wages to an impasse pursuant to a reopener provision, the union sought arbitration. 491 F.2d 1029, 1030 (8th Cir. 1974). The CBA contained provisions for resolving grievances, including through arbitration, and also contained a limitation that an arbitrator did not have the authority to "add to, subtract from, or change the terms of the contract." *Id.* at 1031. The Eighth Circuit in this case upheld the decision of the District Court that the wage dispute was arbitrable. Citing this Court's decision in *United Steelworkers v. Warrior and Gulf Navigation*, 363 U.S. 574 (1960), the Eighth Circuit held that absent any express provision excluding a matter from arbitration, any disputes arguably under a CBA containing an arbitration provision are arbitrable. *Mahoney*, 491 F.2d at 1032. The Eighth Circuit recognized concerns that its decision will make all mid-term wage disputes arbitrable, but points out that

parties seeking to exclude this type of dispute from arbitration can include language to that effect in the CBA. *Id.* at 1033. The decision did not once mention the NLRA.

C. The Third Circuit Decision Holds that the Right to Implement at Impasse arises both from the CBA and the NLRA and is Arbitrable

The Third Circuit's decision in *Five Star Parking* diverges from those of the First, Tenth and D.C. Circuits by finding that disputes over the operation of reopener provisions arise *both* from the NLRA *and* the CBA, thus converting the primary jurisdiction of the NLRB into concurrent jurisdiction. (App. 11a-12a). In this case, after Five Star implemented its final offer after declaring an impasse in reopener negotiations, the parties agreed to arbitrate whether the CBA had been breached. (App. 22a). Five Star made clear, however, that it was not willing to arbitrate the existence of an impasse, because that was a matter of federal labor law and not a question under the CBA. (App. 15a). After the arbitrator found that Five Star had breached the CBA by failing to negotiate to an impasse, the District Court vacated the Award, holding that the only issue decided by the arbitrator was the existence of an impasse, a term to be interpreted by the NLRB and not by an arbitrator operating under a rights arbitration clause. (App. 17a-19a). The Third Circuit reversed. (App. 12a). While it agreed with the District Court that "the concept of impasse and whether the parties bargained in good faith" raised questions of unfair labor practices, it also believed that the terms of the reopener provision itself were in dispute and provided an independent basis for the

arbitrator's jurisdiction. (App. 11a-12a). The Third Circuit held that because the reopener clause contemplated that the parties "negotiate", the arbitrator could decide that a failure to negotiate was a violation of the CBA. *Id.*

D. The Dispute in *Five Star Parking* Would Not Be Arbitrable Under the Holdings of the First, Tenth, and D.C. Circuits

In *Five Star Parking*, the Third Circuit found that an arbitrator operating under a rights arbitration provision had the authority to interpret the word "negotiation" in an economic reopener provision to require something different than what the NLRA requires. Applying the standards discussed in *International Brotherhood of Electrical Workers*, *Colorado-Ute* and *Ottoway Newspapers*, the meaning of the terms within the reopener provision are governed by the NLRA. The requirement to negotiate in good faith arises from the NLRA, and the text would need to evidence a clear agreement to limit the rights provided to the parties under the NLRA. Since the text demonstrates no such agreement to limit Five Star's right to implement at impasse or to modify the good faith requirement, the dispute over Five Star's implementation at impasse is a question for the NLRB and not within the jurisdiction of an arbitrator.

CONCLUSION

Based on the conflicting decisions of the Circuit Courts described above, employers and unions are placed in an untenable position that requires resolution by this Court. Employers and unions need guidance concerning the applicability of federal labor law to the context of reopener negotiations. This Court has made clear that when employers and unions bargain to impasse, the parties are entitled to resort to their respective economic weapons, the employer to implementing its most recent offer and unions to the right to strike. Many courts find that these rights arise under the NLRA and fall under the primary jurisdiction of the NLRB and that arbitration of these rights amounts to impermissible interest arbitration, while other courts find that because the reopener provision appears in the CBA, its language, and thus rights attendant to the negotiations, is arbitrable even in the absence of an interest arbitration provision. This issue presents a question of overriding importance because it affects reopener bargaining nationwide. Indeed, absent resolution by this Court, reopener bargaining may become a "charade" rather than an important part of the collective bargaining process. Finally, clarity is needed concerning the status of reopener provisions and the respective rights and obligations of employers and unions under these widely-used occasions of collective bargaining.

For the foregoing reasons a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JULY 24, 2007

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-2012

FIVE STAR PARKING

v.

UNION LOCAL 723, affiliated with the International Brotherhood of Teamsters,

Appellant.

Argued March 28, 2007
Filed July 24, 2007

Before RENDELL, BARRY and CHAGARES, *Circuit Judges.*

OPINION OF THE COURT

CHAGARES, *Circuit Judge.*

Appellant International Brotherhood of Teamsters Union Local 723 (the "Union") appeals from an Order of the United States District Court for the District of New Jersey entered on December 21, 2005 which vacated an arbitration award favorable to the Union. For the reasons expressed below, we will reverse the District Court and remand with instructions to confirm the award.]

Appendix A

I.

Appellee Five Star Parking ("Five Star") manages and operates parking lots at Newark Liberty International Airport. The Union represents employees at Five Star's Newark Airport parking facilities. Five Star and the Union are parties to a collective bargaining agreement ("CBA"). The CBA provides that unresolved grievances may be submitted to arbitration for final, binding resolution. Article 4 Section 1 of the CBA defines the scope of arbitration as including: "Any controversy, claim, dispute or grievance arising between the Company and the Union or any Employee, involving or concerning the meaning, interpretation, operation, or application of any clause of this Agreement, or by a breach or threatened breach of this Agreement." A101. An arbitrator's power to resolve grievances, found at Article 4(i), is

> limited to the particular dispute in question and [the arbitrator] shall be bound and governed by the provisions of this contract and restricted to its application to the facts presented to him. . . . The arbitrator shall not have jurisdiction or authority to add to, modify, detract from, or alter in any way the provisions of this Agreement or any amendment or any supplement thereto.

A102. In other words, an arbitrator is limited to resolving disputes over "rights" in the CBA and shall not engage in what is known as "interest" arbitration—the creation of new rights not previously contemplated by the parties.

Appendix A

The CBA does not include procedures to resolve an "impasse." Impasse is not mentioned in the CBA.

Five Star and the Union negotiated specific wages for cashiers, traffic attendants, valet attendants and lot checkers. These wage rates are reflected in Schedule A of the CBA and were in effect from August 1, 2002 to July 31, 2003. After the first year, the CBA provided for 3% wage increases across the board to commence on August 1, 2003 and continue until July 31, 2004. Thereafter, the CBA was silent as to wage increases; presumably wages were to remain static unless further wage negotiation took place. To this end, the CBA contained a "re-opener" provision which permitted the parties to re-negotiate wages as of August 1, 2004 and again as of August 1, 2006 with 60 days notice to the other party. The Union agreed that "during such periods of re-opener, the no-strike, no lockout provisions of this Agreement shall remain in full force and effect." A117.

On June 18, 2004, the Union invoked the re-opener provision. The Union sought a $1.00 per hour wage increase in each succeeding year of the CBA-2004 to 2008. The parties met briefly on July 20, 2004 for their first negotiation session. At the July 20 meeting, which lasted about one hour, Five Star indicated that its labor costs were exceeding the budget provided to the Port Authority of New York and New Jersey ("Port Authority") and that the Port Authority was going to request new bids for the management of the Newark facilities. Five Star sought a 12.5% reduction in labor costs.

The parties met again on August 3, 2004 for approximately one hour. The Union indicated it was not interested in negotiating a regressive contract and sought financial data from Five Star as proof that it was operating over budget. On August 9, 2004, counsel for Five Star responded by sending the Union a letter summarizing Five Star's financial condition, but without supporting financial data. In the letter, Five Star stated that it "wants to avoid any unilateral action consequent to a good faith impasse in negotiations ." A123.

The Union replied by letter dated August 13, 2004, in which it reiterated that it would not "bargain against itself." A128. Addressing Five Star's contention that the Port Authority might replace Five Star as manager of the Newark Airport parking facilities, the Union stated, "[i]n several months, it is possible that Five Star Parking will not be at this facility. Thus, it is hard, as indicated at the meeting, for Local 723 to negotiate concessions to the collective bargaining agreement for a Company that may no longer be at this facility and then be left with those concessions for the new vendor coming in." *Id.* The Union further stated that Five Star was obligated to bargain in good faith and to date, no bargaining had occurred—only Five Star's unilateral demand that labor costs be reduced by 12.5%. Finally, the Union made a second request for financial information covering the period from July 2002 to August 2004. Ultimately, it appears that financial information pertaining to the Newark facility was made available to the Union, but not financial information concerning Five Star's other operations.

On August 27, 2004, in writing, Five Star reiterated its proposal for wage reductions and indicated that "[i]f the Union continues to insist upon conditioning negotiations upon receiving financial information that it is not by law entitled to, and declines to resume negotiations on September 3, 2004, a date offered by the Union, the Company will deem the parties to be at an impasse. Accordingly, it will be free to implement unilaterally its pending and oft repeated proposal to reduce rates of pay." A29.

On September 1, 2004, the Union wrote to Five Star indicating that it was withdrawing its request for re-opener and would file an unfair labor practice charge with the National Labor Relations Board ("NLRB") and file for arbitration if Five Star unilaterally implemented a wage reduction.

On September 2, 2004, Five Star declared an impasse. On September 14, 2004, the Union filed an unfair labor practice charge with the NLRB alleging that Five Star violated section 8(a)(1) and (5) of the National Labor Relations Act ("NLRA"). Prior to a ruling by the NLRB, however, the Union voluntarily withdrew its charge.

On September 17, 2004, Five Star implemented a 12.5% wage reduction for all employees. On September 21, 2004, the Union filed a grievance contesting Five Star's unilateral implementation of the wage decrease as a violation of Article 20 and Schedule A of the CBA. The grievance stated, "On September 17, 2004, Five Star

Parking unilaterally, without negotiations, without 'impasse' in negotiations, implemented a [12.5%] wage reduction." A137. The case proceeded to arbitration.

At the arbitration hearing, the parties stipulated to the issue to be decided: "Did the Employer violate Article 20 and Schedule A[1] of the Agreement when on September 17, 2004, Five Star Parking implemented a wage reduction?" A23. Five Star argued that the arbitrator lacked jurisdiction over the dispute because resolution required a determination of whether an impasse occurred. According to Five Star, determining whether an impasse occurred requires interpretation of the NLRA, something only the NLRB can do.

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1. Article 20 states, in pertinent part: "Section 1: The rates of pay shall be in accordance with [Schedule] A annexed hereto and made a part hereof." A112.

Schedule A list rates of pay for the different job classifications. A118.

Section 2(a) of Schedule A is entitled "Future Pay Increases" and states: "For the period commencing August 1, 2003 and continuing until July 31, 2004, all employees shall receive an across-the-board increase in their respective personal hourly rates of pay equal to three percent (3%). It is agreed, however, that the actual effective date shall be the first day of the first pay period falling on or after August 1, 2003." *Id.* Section 2(b) states: "In accordance with the provision of Article 12 of this Agreement, this Agreement may be reopened by either party as of August 1, 2004 and August 1, 2006, but solely for the purpose of negotiating concerning rates of pay and other monetary benefits, but for no other purposes, without exception." *Id.*

Appendix A

The arbitrator sustained the grievance by an Opinion and Award dated August 3, 2005. The arbitrator concluded that "[b]ased on the facts in evidence, there is no question that the Employer's action of September 17, 2004, in reducing the employer's [sic] wages was violative of the collective bargaining agreement." A55. Later in the opinion, the arbitrator reiterated that "[t]he Employer's unilateral action of reducing the wages of bargaining unit members was in violation of the Agreement." A58. Five Star was ordered to pay back pay to all employees whose wages were reduced.

In dealing with Five Star's jurisdiction argument, the arbitrator identified the "gravemen [sic] of the Union's argument [as being] that the Employer unilaterally implemented a 12.5% wage reduction. All other issues of a statutory nature are not before me. . . . My only determination will be whether or not the contract was violated." A52-A53. However, the arbitrator commented, "I find it extremely difficult to accept the Employer's argument that an impasse existed after approximately two, maybe three, hours of bargaining," and "[b]ased upon all of the evidence and voluminous documentation presented by both parties, I am not convinced that an impasse existed." A54. Finally, the arbitrator explained,

> When an employer proposes a wage reduction that is agreed to by a Union that is a concession. Concessionary bargaining produces some interesting results. However, in the instant matter, the Employer never

> allowed the negotiations process to really move forward or to pick up steam to see where they could reach some type of common ground. They simply said, we will not give you the additional financial information you are asking for, and if you do not show up for the September 3, 2004 negotiating session we are declaring an impasse. Accordingly, they declared an impasse and reduced the wages of the employees.
>
> . . . .
>
> What is before me is that the Employer's action breached the Agreement. I have already determined that it did.
>
> It breached the Agreement because there was no impasse. . . . I can't accept the limited time spent in bargaining as a basis for the Employer's authority to reduce the wages of the bargaining unit members.

A56-A57.

Five Star moved to vacate the arbitration award before the District Court. The Union cross-moved for summary judgment to confirm the award. The District Court vacated the arbitration award, concluding that "the arbitrator exceeded his jurisdiction in granting the arbitral award. An arbitrator's role is to interpret the terms of the CBA rather than to decide issues of unfair

labor practices. The latter is governed by the NLRA and under the jurisdiction of the NLRB." A6 (citation omitted). Here, according to the District Court, the arbitrator failed to ground the decision in any provision of the CBA. Instead, the arbitrator decided that the parties had not reached an impasse and therefore Five Star violated the CBA by instituting a wage reduction. The District Court held that the arbitrator's decision rested improperly and exclusively on its interpretation of the concept of "impasse." The Union appealed.

II.

The District Court exercised jurisdiction pursuant to section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 and 28 U.S.C. § 1331. The final order of the District Court vacating the arbitration award disposed of all the Union's claims. Our jurisdiction is premised upon 28 U.S.C. § 1291.

We exercise plenary review over the District Court's ruling. *Major League Umpires Ass'n v. Am. League of Prof'l Baseball Clubs*, 357 F.3d 272, 279 (3d Cir.2004). Arbitration awards enjoy a strong presumption of correctness. We will uphold an arbitration award that "draws its essence from the collective bargaining agreement." *Id.* at 280 (citations omitted). Although an arbitrator's interpretation of a collective bargaining agreement is accorded substantial deference, it may be vacated if the arbitrator demonstrates manifest disregard for the collective bargaining agreement. *Id.* "Manifest disregard for the CBA is established when

the arbitrator's award is totally unsupported by principles of contract construction." *Id.* (internal quotations and citations omitted). As long as an "'arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.'" *Eastern Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000) (quoting *United Paperworks Int'l Union AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987)). Here, it is clear that the arbitrator acted within the scope of his authority and committed no error in construing and applying the CBA. Consequently, we will uphold his decision.

III.

The District Court vacated the arbitration award based on its perception that the arbitrator lacked jurisdiction to decide the issue of whether impasse existed and also because it concluded that the arbitrator "failed to ground his decision in any provision of the CBA." A7. The District Court rightly recognized that "[w]hile it is true that, for purposes of efficiency and economy, an arbitrator may at times hear issues pertaining to unfair labor practices, this is only permissible when the arbitrator decides NLRA issues in addition to issues of contract interpretation." *Id.* (citing *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271, 84 S.Ct. 401, 11 L.Ed.2d 320 (1964)). There was clearly an unfair labor practice issue here dealing with

the concept of impasse and whether the parties bargained in good faith. Because the District Court seemingly understood that the issue of impasse could have been decided by an arbitrator if there were also issues of contractual interpretation in dispute, the outcome of this appeal depends on whether there was an arbitrable contractual issue at stake rather than merely on whether the arbitrator could or could not decide the issue of impasse.

By stipulating to the issue to be decided by the arbitrator, "Did the Employer violate Article 20 and Schedule A of the Agreement when on September 17, 2004, Five Star Parking implemented a wage reduction?," it is abundantly clear that Five Star agreed from the outset that the grievance was arbitrable and that it related to Article 20 and Schedule A of the CBA. The arbitration clause broadly provides for arbitration of "[a]ny controversy, claim, dispute or grievance arising between the Company and the Union or any Employee, involving or concerning the meaning, interpretation, operation or application of any clause of this Agreement, or by a breach or threatened breach of this Agreement." The wage re-opener provision in Schedule A of the CBA expressly requires that the parties negotiate; a refusal or failure to negotiate therefore would be a breach of the CBA.

The fact that the parties did not provide for even cost-of-living adjustments to salaries after July 31, 2004, but instead provided for wage re-opener *negotiations* is compelling evidence that they considered negotiation to be the sine qua non of that contractual provision. Although declaring an impasse in bad faith implicates the NLRA,

the statutory requirement to negotiate in good faith overlaps the parties' express contractual agreement to "negotiat[e] concerning rates of pay." It therefore fell upon the arbitrator to interpret the meaning of "negotiat[e] concerning rates of pay" in the wage renegotiation context because this involved or concerned "the meaning, interpretation, operation or application of [a] clause of this Agreement, or . . . a breach or threatened breach of this Agreement." Thus, we conclude that there was a bona fide contractual dispute and the issue was properly before the arbitrator. *See Carey*, 375 U.S. at 271; *see also Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971).

The arbitrator declared an intent to decide whether there was a breach of contract, and in so deciding, found that the parties failed to negotiate pursuant to the express terms of Schedule A of the CBA. The award merely returns the salaries to the status quo by ordering Five Star to pay back the amounts wrongly deducted therefrom. It does not set new salaries for the parties. The arbitrator did not engage improperly in interest arbitration, *see Pennsylvania Power Co. v. Electrical Workers, Local 272*, 886 F.2d 46, 48-49 (3d Cir.1989), but rather acted within the scope of his authority to construe and apply the CBA.

For the foregoing reasons, we conclude that the arbitration award draws its essence from the CBA and should not be disturbed. Accordingly, we will reverse the District Court's Order of December 20, 2005, and remand to the District Court with instructions to confirm the arbitration award in favor of the Union.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED DECEMBER 23, 2005

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. 05-CV-3975 (WJM)

FIVE STAR PARKING,

Plaintiff,

v.

LOCAL 723,

Defendant.

December 23, 2005

OPINION

MARTINI, J.

THIS MATTER comes before the Court on Plaintiff Five Star Parking's ("Five Star's") motion to vacate an arbitration award and Defendant Local 723's ("the Union's") cross-motion for summary judgment to confirm the arbitration award. This Court heard oral arguments on November 3, 2005. For the reasons stated below, this Court GRANTS Plaintiff's motion to vacate and enjoin enforcement of an August 3, 2005 arbitration award, DENIES Plaintiff's motion for attorney's fees, and DENIES Defendant's motion in its entirety.

Appendix B

I. Background:

This is a labor dispute between Five Star, which operates parking garages, and the Union, an employees union representing cashiers, traffic attendants, valet attendants, and lot checkers employed by Five Star at Newark Airport.

The parties are signatories to a Collective Bargaining Agreement ("CBA"), which governs the period from August 1, 2002 until July 31, 2008. Although the CBA set specific wage rates for the period from August 1, 2002 until July 31, 2004, it did not set wage rates for the period after August 1, 2004. Thus, on June 18, 2004, pursuant to terms in the CBA, the Union requested wage reopener bargaining.

Negotiations did not go smoothly. Five Star expressed its intention to reduce wages in light of the fact that its operating costs far exceeded the budget approved by the Port Authority of New York and New Jersey. The Union rejected Five Star's proposal. Further, in a letter dated August 13, 2004, the Union demanded disclosure of Five Star's financial documents and stated its intention to file an unfair labor practice charge with the National Labor Relations Board ("NLRB") should Five Star unilaterally reduce wages. Five Star took the position that the parties had reached an "impasse," and on September 17, 2004, implemented a 12.5% wage reduction.[1] In response, on

1. Under the NLRA, when negotiations reach an impasse, the employer is free to implement changes in employment terms unilaterally so long as the changes have been previously offered to the Union during bargaining. *Saunders House v. NLRB*, 719 F.2d 683 (3d Cir.1983). Otherwise, if no impasse exists, such a unilateral change constitutes a violation of sections 8(a)(1) and (5) of the NLRA. *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

September 21, 2004, the Union submitted a grievance to the NLRB, alleging unfair labor practices.

According to Five Star, the NLRB reviewed the Union's grievance and expressed its intention to rule against the Union. Five Star also alleges that, in lieu of receiving an adverse decision, the Union withdrew its grievance and commenced an arbitration proceeding. The Union does not dispute either of these allegations.

Upon commencement of the arbitration proceeding, the parties jointly submitted to the arbitrator the issue of whether Five Star had violated the CBA. At the same time, Five Star contested the arbitrator's jurisdiction to decide on the question of whether the parties had reached an impasse. Five Star argued that, since the issue of impasse arose under the National Labor Relations Act ("NLRA"), it fell under the jurisdiction of the NLRB. The arbitrator disagreed and instead found that the arbitration clause of the CBA was far-reaching enough to give him jurisdiction to decide the issue.[2]

In deciding on the merits of the Union's claim, the arbitrator found that the parties had not reached a bargaining "impasse," and that therefore Five Star had not been free to implement a unilateral wage reduction. He concluded that Five Star had violated the CBA by

2. Article 4, Section 1 of the CBA, the arbitration clause of the agreement, covers "[a]ny controversy, claim, dispute or grievance arising between the Company and the Union or any employee, involving or concerning the meaning, interpretation, operation or application of any clause of this agreement, or by a breach or threatened breach of this agreement."

decreasing wages. The arbitrator issued a cease and desist order and further awarded the Union employees back pay for the period during which wages had been reduced.

Five Star has not complied with the award. Instead, it has moved to vacate the award on the following grounds: (1) the arbitrator exceeded the scope of his authority in deciding on the issue of impasse; (2) even if Five Star had agreed to arbitrate disputes involving the NLRA, the arbitrator misinterpreted the statute in finding the parties had not reached an impasse; and (3) the arbitrator incorrectly found that the CBA required Five Star to pay a set wage after August 1, 2004.

II. Standard of Review

As a general matter, district courts have little authority to upset arbitrators' awards. *United Transp. Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 379 (3d Cir.1995). When dealing with a labor dispute, if an arbitration award is not in "manifest disregard" of the contract and "draws its essence" from the contract, it should be enforced by a reviewing court. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001); *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983). Where an arbitrator's decision fails to draw its essence from the CBA, however, the award must be vacated. *See Citgo Asphalt Refining Co. v. Paper, Allied-Indus., Chem. & Energy Workers Int'l Union*, 385 F.3d 809, 815 (3d Cir.2004).

III. Analysis

Turning first to jurisdictional issue, the record before this Court demonstrates that the arbitrator exceeded his jurisdiction in granting the arbitral award. An arbitrator's role is to interpret the terms of the CBA rather than to decide issues of unfair labor practices. The latter is governed by the NLRA and under the jurisdiction of the NLRB. *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960) ("an arbitrator is confined to interpretation and application of the collective bargaining agreement"); *Graphic Arts Int'l v. Haddon Craftsmen*, 796 F.2d 692 (3d Cir.1986) (finding arbitrator properly decided only claims arising under CBA and declining jurisdiction on "naked" NLRA claim). With regard to the issue of whether parties involved in labor negotiations have reached an impasse, courts have found that the question of impasse arises under the NLRA and should be decided by the NLRB. *See Newspaper Guild of Salem v. Ottoway Newspapers, Inc.*, 79 F.3d 1273 (1st Cir.1996) (finding no error in district court refusal to order arbitration of whether impasse existed because allowing arbitration would allow party to circumvent NLRB); *Local Union No. 884 v. Bridgestone/Firestone, Inc.*, 61 F.3d 1347 (8th Cir.1995) (finding question of impasse not covered by CBA arbitration clause and therefore not to be raised before arbitrator); *see also U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc.*, 790 F.2d 423 (5th Cir.1983) (expressing view that NLRB is "particularly qualified," because of specialized expertise, to decide

whether parties have reached an impasse).[3] While it is true that, for purposes of efficiency and economy, an arbitrator may at times hear issues pertaining to unfair labor practices, this is only permissible when the arbitrator decides NLRA issues *in addition to* issues of contract interpretation. *See Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964); *Int'l Harvester Co.*, 138 N.L.R.B. 923 (1962). To permit otherwise would render the NLRB largely superfluous.

In this case, the arbitrator failed to ground his decision in any provision of the CBA. Upon deciding the parties had not reached an impasse, he simply concluded that Five Star had violated the CBA by instituting a wage reduction.[4] The arbitrator's decision, as far as this Court

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3. The Union cites a number of cases which purportedly stand for the proposition that an arbitrator can decide the issue of impasse. However, none of those cases apply here, either because the arbitrator in those cases grounded his decision in specific provisions of the CBA, *e.g.*, *Edna H. Pagel, Inc., v. Teamsters Local Union 595*, 667 F.2d 1275 (9th Cir.1982), or because the NLRB had issued a decision on the impasse issue prior to arbitration, *e.g.*, *Yorkaire, Inc. v. Sheet Metal Workers Int'l Ass'n*, 758 F.Supp. 248 (E.D.Pa.1990).

4. "I find it extremely difficult to accept the Employer's argument that an impasse existed after approximately two, maybe three, hours of bargaining.

. . . .

I cannot accept the limited time spent in bargaining as a basis for the Employer's

(Cont'd)

can discern, rested wholly on his interpretation of the NLRA term "impasse" and the effect of Five Star's wage reduction given his finding there was no impasse. There is no indication that the arbitrator grounded his decision on an interpretation of provisions within the CBA.[5]

Based on this holding, this Court finds it unnecessary to address Five Star's other arguments.

V. Conclusion:

This Court finds that the arbitrator did not have jurisdiction to decide the issue of impasse, and that his decision otherwise failed to draw its essence from the CBA. Accordingly, this Court grants Five Star's motion to vacate the award of the arbitrator and to enjoin enforcement of the award. It also denies the Union's motion in its entirety. *See AFGE v. FLRA*, 850 F.2d 782 (D.C.Cir.1988) (affirming vacatur of arbitral award where arbitrator did not have jurisdiction to hear a

(Cont'd)

> authority to reduce the wages of the bargaining unit members. Accordingly, there is no question in my mind that the Employer's action breached the agreement."

Five Star Parking v. IBT Local 723, No. 04-0250, 32, 35 (2005) (Restaino, Arb.).

5. This Court is mindful of the broad language of the arbitration clause in the CBA. It nevertheless finds the clause is not broad enough to confer jurisdiction upon an arbitrator to decide on a naked NLRA claim.

dispute). Further, this Court, finding that the Union did not litigate in bad faith, vexatiously, or for oppressive reasons, denies Five Star's request for attorney's fees. *Kane Gas Light and Heating Co. v. Int'l Bhd. of Firemen and Oilers, Local 112*, 687 F.2d 673 (3d Cir.1982).

APPENDIX C – OPINION AND AWARD OF THE NEW JERSEY STATE BOARD OF MEDIATION DATED AUGUST 3, 2005

NEW JERSEY STATE BOARD OF MEDIATION

CASE NO. 04-0250

In the Matter of the Arbitration Between

FIVE STAR PARKING,

EMPLOYER

AND

IBT LOCAL 723,

UNION

OPINION AND AWARD

PROCEDURAL BACKGROUND

The parties in this dispute are signatories to a collective bargaining agreement dated August 1, 2002, through July 31, 2008. The grievance filed by IBT Local 723, hereinafter referred to as the Union, on behalf of all bargaining unit employees, alleges that Five Star Parking, hereinafter referred to as the Employer/FSP, violated the terms of the Agreement.

The grievance was timely processed through the grievance procedure, and a request was made to the New

Jersey State Board of Mediation to submit a panel of arbitrators. On January 3, 2005, the undersigned was appointed arbitrator.

A hearing was held on May 4, 2005, at the offices of the NJSBM. At the hearing, each party had a full and complete opportunity to present evidence and testimony on their behalf, to examine and cross-examine witnesses under oath and to argue their respective positions. Capable, competent counsel represented each party and both parties elected to submit post-hearing briefs.

Due to business and personal circumstances, the parties were granted extensions to submit their respective briefs. Both briefs were received on June 22, 2005. The hearing was officially closed on June 27, 2005.

ISSUE

The parties stipulated to the following issue:

Did the Employer violate Article 20 and Schedule A of the Agreement when on September 17, 2004, Five Star Parking implemented a wage reduction? If so, what shall be the remedy?

Appendix C

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 4 – GRIEVANCE PROCEDURE

Section 1: Any controversy, claim, dispute or grievance arising between the Company and the Union or any Employee, involving or concerning the meaning, interpretation, operation, or application of any clause of this Agreement, or by a breach or threatened breach of this Agreement, shall be settled in the following manner:

> (i) The arbitrator shall be limited to the particular dispute in question and shall be bound and governed by the provisions of this contract and restricted to its application to the facts presented to him involved in the grievance. The arbitrator shall not have jurisdiction or authority to add to, modify, detract from, or alter in any way the provisions of this Agreement or any amendment or any supplement thereto.

ARTICLE 9 – MANAGEMENT RIGHTS

Section 1: The management of the Company and the discretion of the working force are vested solely and exclusively in the Company and shall not in any way be abridged except by specific restrictions as are set forth in this Agreement.

Section 2: The Union recognizes that the management of the Company's business includes, but is

not limited to, the assignment and direction of the working force, the determination of the number and qualifications of Employees to be employed or retained by the Company, the right to hire, suspend, discharge, discipline, promote, demote or transfer Employees, to make operational improvement, to maintain reasonable and proper discipline and the right to release Employees because of lack of work or for other proper reasons are vested exclusively in the Company. It is understood that the Union does not waive its rights, under the grievance procedure, to question any arbitrary action deemed unjust. It is understood that a position or classification of employment may be abolished.

Section 3: The Union recognizes that in consideration of the commitments assumed by the Company in this contract the management has, among others, the right to require from all employees efficient service in the performance of their duties.

Section 4: The Union agrees that its officers, agents and members shall not oppose or interfere, directly or indirectly, with the legitimate or reasonable efforts of the Company to train Employees, to improve the skill and ability of the Employees, to make operational improvement to maintain reasonable and proper discipline and efficiency, and to make economic improvements in the operation of its business.

Section 5: Management may do bargaining unit work during meal periods, breaks or for training purposes or emergencies, provided the manager uses his/her own bank when in a cashier's lane.

Appendix C

Section 6: Employees may be required to perform temporary work other than their primary jobs. Employees must perform all such duties assigned to them. When employees are assigned to perform a job in a higher paying classification, the affected employee shall receive the higher rate of pay for the day. When employees are assigned to perform a job in a lower paying classification, the affected employee shall receive the higher rate of pay for the day.

Section 7: If at any time during the term of the Company's Agreement with the Port of New York and New Jersey Authority to operate the parking facility mentioned in Article 2 is terminated, Company shall have the right to terminate the employment of all of the Employees covered under this Agreement without liability.

Section 8: The foregoing enumeration of management rights shall not be deemed to exclude other rights of management not specifically set forth, the Company therefore retaining all rights not otherwise specifically covered by this Agreement, irrespective of whether or not the same have been heretofore exercised.

ARTICLE 12 – STRIKES AND LOCKOUTS

Section 1: During the term of this Agreement, the Union will not strike (including sympathy strikes), engage in work stoppages, slow down, picketing at or near the Company's premises. The Company during the life of this Agreement, will not lock out any Employee.

Appendix C

ARTICLE 32 - TERM OF AGREEMENT

This Agreement shall become effective August 1, 2002 and shall remain in effect to and including July 31, 2008, and from year to year thereafter unless notice of desire to amend or terminate is given in waiting by one party to the other sixty (60) days prior to the expiration date of this Agreement. It is agreed, however, that as of August 1, 2004, and August 1, 2006, this agreement may be reopened by either party (upon sixty (60) days of written notice) solely for the purpose of renegotiating concerning wages and monetary fringe benefits, but for no other purpose. It is further agreed that during such periods of re-opener, the no strike, no lockout provisions of this Agreement shall remain in full force and effect as shall all other non-monetary terms and conditions hereof.

SCHEDULE "A"
(Per Hour)

2(a) *Future Pay Increases*: For the period commencing August 1, 2003 and continuing until July 31, 2004, all employees shall receive an across-the-board increase in their respective personal hourly rates of pay equal to three (3%) percent. It is agreed, however, that the actual effective date shall be the first day of the first period falling on or after August 1, 2003.

(b) In accordance with the provision of Article 12 of this Agreement, this Agreement may be reopened by either party as of August 1, 2004 and August 1, 2006,

but solely for the purpose of negotiating concerning rates of pay and other monetary benefits, but for no other purposes, without exception.

SUMMARY OF FACTS

On August 1, 2002, the Employer became the contractor for the New York/New Jersey Port Authority (Port Authority) to manage parking lots and garages at Newark Liberty International Airport. FSP's responsibility is to manage the parking lots and collect revenues, which are submitted to the Port Authority.

Article 32, Schedule A of the Agreement indicates that there would be a wage reopener effective August 1, 2004, and provides that either party could reopen the contract upon sixty (60) days written notice for the purposes of renegotiating wages and monetary benefits.

On June 18, 2004, counsel for the Union sent a letter to counsel for FSP requesting a wage reopener. This was introduced as Joint Exhibit 4. On July 20, 2004, a meeting was held concerning negotiations for the wage reopener. Present for the Union were Union counsel, David Grossman, Union Secretary-Treasurer, John Humphrey, and Shop Stewards, Daisy Cruz and Ross Lynch. Representing the Company was Allen G. Siegel, counsel for the Employer, District Manager, Jermane Sahoe, Regional Manager, Ken Oldum, and Operations Manager, Michael Joseph.

At that meeting, Mr. Siegel as the spokesperson for FSP, indicated that the Port Authority was about to request bids for the parking lot manager at Newark Liberty International Airport (NLIA). He further indicated that the operational costs of FSP at NLIA were greater than the budget that was being provided from the Port Authority.

Another negotiation session was scheduled for August 3, 2004. Mr. Siegel indicated that the Employer was rejecting the Union's wage reopener proposal. He further indicated that FSP was operating at approximately twelve percent (12%) over the budget that they had received from the Port Authority.

Lisa Caldwell, who has been working at NLIA as a cashier and is also a shop steward for the Union took contemporaneous notes of the August 3, 2004 negotiating session. Those notes were introduced as Union Exhibit 1.

At the August negotiating session, Mr. Humphrey indicated that the Union was not interested in negotiating a recessive contract because that recessive contract would be the starting point for a new bidder/vendor. He suggested that negotiations be placed on hold until sometime in late September 2004 so the parties would know whether or not FSP had been selected by the Port Authority to remain as the parking lot manager.

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Based upon the fact that the Employer was raising an issue that its operating budget was higher than the money received from the Port Authority, the Union requested the financial data of FSP.

On August 13, 2004, Mr. Grossman sent a letter to Mr. Siegel indicating that the Union was seeking FSP's financial information covering the period of January 1, 2002, through August 13, 2004.

Mr. Siegel responded that case law is legion that the Employer is obligated to submit information only about the facility in question. Therefore, the Employer, through Mr. Siegel, indicated they would not comply with any financial information beyond NLIA.

On August 26, 2004, the Union again reiterated its request for the Employer's financial information.

On August 27, 2004, Mr. Siegel (see Joint Exh. 11) indicated, "*The Company Is not pleading an inability to pay. However, the Company is no longer willing to sustain the cumulative losses that it is experiencing at Newark". In order to curtail these unreasonable losses, the Company proposed and is again proposing an across-the-board reduction of twelve and one half percent (12½%) in all of the wage rates and other monetary items that are within the scope of the pending reopener, be made effective as of the first day of the first pay period falling on or after September 1, 2004.*"

Mr. Siegel indicated that this proposal was made to the Union at the August 3, 2004, meeting and again in his letter to Mr. Grossman of August 5, 2004.

Mr. Siegel further indicated, "*If the Union continues to insist upon conditioning negotiations upon receiving financial information that it is not by law entitled to, and declines to resume negotiations on September 3, 2004, a date offered by the Union, the Company will deem the parties to be at an impasse. Accordingly, it will be free to implement unilaterally its pending and oft repeated proposal to reduce rates of pay, and all other monetary items encompassed by the reopener, effective with the first day of the first pay period on or after September 1, 2004, by twelve and one half percent (12½%) across-the board.*"

Mr. Siegel indicated that he urges the Union to bear in mind that the Agreement does not give the Union the right to strike. Moreover, "*The Union's continued insistence upon being given financial information that it is not entitled to, as a condition of meeting, constitutes a violation of Section 8(b)(3) of the NLRA. The Company has no desire to engage in any dispute with the Union, and has made every good faith effort to avoid such a confrontation. Regrettably, the Union does not appear to share this sentiment.*"

On September 1, 2004, Mr. Grossman wrote to Mr. Siegel and indicated that the Union's notice given for the wage reopener was defective. The Union withdrew its request for the reopener (see Joint Exh. 14) and

indicated that it intended to file an unfair labor practice charge with the NLRB and file for arbitration, if FSP unilaterally implemented a wage reduction.

On September 2, 2004, Mr. Siegel sent a letter to Mr. Grossman indicating that the parties were at a bargaining impasse. (See Joint Exh. 14).

On September 17, 2004, the Employer implemented a twelve and one half percent (12½ %) reduction in wages only. It did not reduce everyone's wages. The wage reduction was effective for the pay period beginning September 5, 2004. FSP only reduced wages for employees making more than $9.00 per hour.

On September 21, 2004, the Union submitted a grievance concerning the unilateral implementation of the wage decrease without bargaining. (See Joint Exh. 2).

These are the essential uncontroverted facts in the matter at bar and the issue now comes to me for resolution.

POSITIONS OF THE PARTIES

For the Employer

The Employer boldly asserts that "*The grievance should be dismissed as there is no award that the arbitrator could issue in this matter that would 'draw its essence' from the Agreement.*"

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The Employer takes the position that the grievance does not rise under the Agreement. The grievance form on its face asserts that the grievance arises because the parties were at a lawful bargaining impasse. In other words, the Employer contends that the arbitrator is not being asked to apply or interpret the parties' collective bargaining agreement, but rather to interpret and apply the National Labor Relations Act.

The Employer also contends that impasse is a legal term that is interpreted and applied by the NLRB unless an arbitrator is given contractual authority to rule on that subject matter. Such is not the case here.

The Employer contends that, "*The correct, if not legally mandated, resolution of this matter is for the arbitrator to dismiss it.*" The Employer takes that position because it was made manifest by the Union itself when it framed the issue to be resolved by the Arbitrator. The Employer argues that they stipulated to the issue as presented by the Union and offered no objections.

From the outset, it should be emphasized that the gravemen of the Union's grievance is that FSP implemented the wage reduction "*without impasse in negotiations.*"

The Employer strongly argues that "*whether an impasse existed or not, is not a matter of contract interpretation, rather it is a matter addressed to the National Labor Relations Act, Section 8(a)(5) to be interpreted by the National Labor Relations Board.*"

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The Employer argues that the language of the Agreement at Article 4, Section 1 establishes that, "*Any controversy, claim, dispute or grievance arising between the Company and the Union or any employee, involving or concerning the meaning, interpretation, operation or application of any clause of this Agreement or by a breach or threatened breach of this Agreement, shall be settled in accordance with the contracted grievance procedure, which procedure includes arbitration.*" However, the Employer contends that the arbitration provision precludes the arbitrator from addressing the issue stipulated to by the parties. The Employer contends that the language of the Agreement at subsection 1(i) indicates that, "*The arbitrator shall be limited to the particular dispute in question and shall be bound and governed by the provisions of this contract and restricted to its application to the facts presented to him involving the grievance. The arbitrator shall not have jurisdiction or authority to add to, modify, detract from or alter in any way the provisions of this Agreement or any amendment or supplement thereto.*"

FSP argues that there is no reference in the Agreement to impasse or to any authority granted to the arbitrator to apply or interpret the law that is applied in cases of impasse. The Employer argues that it is not uncommon for parties to a collective bargaining agreement to grant to an arbitrator the authority to interpret or apply the law or matters outside the four corners of the parties' Agreement. However, that was not done in this case.

Moreover, the grievance submitted by the Union as Exh. J-2 does not require the Arbitrator to interpret any provisions of the Agreement. It simply asked him only to interpret the National Labor Relations Act and specifically Section 8(a)(5) thereof and to assess conduct in that framework alone.

The Employer strongly argues that all of the conduct involved in the instant matter occurred outside the Agreement. Moreover, should the arbitrator award the Union any relief, he would be engaging in interest arbitration, which he manifestly cannot do without the consent of the parties.

On April 20, 2004, Mr. Siegel submitted a motion for the instant matter to be dismissed, or in the alternative, that there be a summary award in favor of FSP.

On April 25, 2005, the undersigned wrote to Mr. Siegel with a copy to Mr. Grossman stating in part that, "*I am not willing to be liberal and grant your motion based upon an ex parte partial record. At the hearing scheduled for May 4, 2005, you certainly have the right to amplify your extensive documentation. Moreover, the Union must be given an opportunity to present its case in chief and quite possibly refute your arguments. Accordingly, your motion to dismiss the instant matter is denied as is your motion for summary judgment.*"

The Employer argues that any arbitration award must draw its essence from the Agreement. This

principle and its vitality are not novel and FSP references the seminal U.S. Supreme Court decision in *Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960) in which the court said, "*An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws it essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.*"

The Employer argues that at the outset of the hearing, the Union urged the Arbitrator to consider the issue of the Union's failure to comply with Section 8(d) of the NLRA. In other words, the Union is asking for relief because it did not comply with Section 8(d) and, therefore, FSP, as well, did not comply with Section 8(d). Thus, the Union argues that there is no valid reopener. The Employer contends, "*This is an astounding contention in light of the fact that the Union is urging relief based on its own non-compliance with the statute. In essence, the Union is contending that it should be allowed to benefit from its own mistakes.*"

The Employer argues that case law developed by the NLRA and the Court of Appeals established that the burden of complying with Section 8(d) rests exclusively with the party initiating negotiations and that the other party is not similarly obligated. "*It is*

undisputed that it was the Union that commenced the bargaining process and, thus, it Is clear that the Union cannot now complain or seek comfort from the fact that neither it nor FSP may have technically complied with the provisions of Section 8(d)."

"*The Employer contends that this is the identical contention made to the NLRB when the Union filed Section 8(a)(5) and (1) charges against FSP. Those charges were, at the request at the NLRB, withdrawn in lieu of dismissal.*"

Moreover, the issue of impasse is equally apposite for this contention since the arbitrator would not be interpreting the Agreement or the conduct of the parties in applying the Agreement, but would, rather, be interpreting and applying the National Labor Relations Act. "*This authority is not granted to the arbitrator by the agreement or the parties. Hence, no award based on Section 8(d) could possibly draw its essence from the Agreement.*"

The FSP argues, "*Assuming, arguendo, that the arbitrator could decide the issue of impasse, the undisputed facts established that such an impasse' was reached by the parties.*"

The Employer argues that the record contains all of the correspondence of parties and Minutes of the two bargaining sessions. The Employer argues that the charges filed by the Union with the NLRB were withdrawn by the Union because the withdrawal was

requested by the Board in lieu of dismissal. "*In any event, it is obvious that the Board, on the facts in the record here, declined to issue a complaint or initiate any proceedings against FSP in connection with the wage reduction.*"

The Employer contends that while the NLRB was making its investigation, the agent assigned contacted Mr. Siegel and stated that the Unions charges were based essentially on two grounds: (1) FSP did not comply with the provisions of Section 8(d) requiring various notices attendant to contract negotiations; and (2) FSP failed and refused to give the Union its company-wide financial statements, though FSP readily agreed to give such information limited to its operations at Newark Airport and its relationship with the Port Authority of New York and New Jersey.

The Employer argues that, "*In advance of the arbitration hearing convened on Wednesday, May 5, 2005, in its motion to dismiss papers, the Employer submitted voluminous exhibits and arguments in support of its position that there was indeed and in law a bargaining impasse that allowed the Employer to institute its last and final 'offer' to reduce wages by twelve and one half percent (12½%).*"

The Employer contends that it was the Union's position in its refusal to engage in good faith negotiations that led to the instant issue because the Union conditioned further bargaining sessions on receiving company-wide financial statements.

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At the hearing of May 4, 2005, the Employer contends that the Union made a new and fanciful contention that must be addressed and refuted. The Union contended anew that FSP was not legally permitted to institute its last and final offer because there was an alleged agreement at the negotiating meeting of August 3, 2004, to the effect that the parties would maintain the *status quo* pending further negotiations following the decision made by the Port Authority as to the identity of the parking operator following its bidding process.

The Employer strongly argues that it should be immediately born in mind that this contention on its face is absurd. The record reflects that there was undisputed testimony that the bidding process would take at least six months, and the Employer was sustaining a direct cash loss of at least $100,000.00 per month out of its own pocket. It is illogical and bizarre to think that the Employer would have agreed to continue this stiff cash loss of nine more months and incur an additional loss of close to $900,000.00.

The Employer strongly contends that the "*whole purpose for proposing the wage cut was to curtail these gigantic cash losses.*"

The Employer contends that, "*To substantiate its position, the Union proffered two employee witnesses, both shop stewards. One witness claims that she made contemporaneous notes, which were admitted into evidence. The Employer suggests that these Minutes*

were either inauthentic or were not made contemporaneously. This conclusion is manifest by several factors:

> *(1) Management notes are consistent and unambiguous as well as largely undenied. The notes of management were kept by the undersigned counsel and were promptly transcribed following the negotiation sessions;*
>
> *(2) The Union's witnesses, to be charitable, were vague with virtually no recollection of anything else that was said at the meeting."*

On cross-examination "*both witnesses frequently admitted that they could not remember any of the critical or material content of the discussions that occurred at the meeting. The most frequent responses were 'I don't know or I don't remember'. They only remember the single report that was the basis for the Union's newest assertion concerning the agreement for a negotiating hiatus that would have generated an additional cash loss of at least $900,000.00. On the other hand, FSP submitted its notes of the meeting which directly contradict the Union's position; notes that were maintained by counsel.*"

Moreover, FSP witness Kenneth Oldum, the Company's Regional Manager, who was present at the negotiations, had clear and unambiguous recollection of the comments that were made.

Furthermore, assuming *arguendo*, that such an agreement was in fact made, it is black letter law that there is no enforceable agreement on any single issue unless and until there is an agreement on the entire package or a lawful impasse. Hence, "*FSP was empowered to withdraw the alleged agreement that the parties wait until the Port Authority completed the bid process, because an impasse was eventually reached that did not include that alleged understanding. It is familiar law that the duty to bargain in good faith does not mean that agreement must be reached.*"

The Employer argues that when bargaining to impasse fails to produce an agreement on a particular matter, management is allowed to take unilateral action consistent with its proposal in bargaining.

The Employer contends that in numerous communications with Mr. Grossman, FSP told the Union that it was interested unconditionally in continuing the bargaining and finding some solution to their impasse. The Union adamantly refused all such entreaties unless and until FSP provided to the Union the financial statement of the Company at large. This was stated as a condition precedent to any meeting. Nevertheless, another meeting was indeed scheduled for September 3, 2004, in a last-ditch effort to reach an accommodation. The Union summarily canceled this meeting and repeated its refusal to meet in the absence of the Employer's company-wide financial information to which it was not entitled.

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The record clearly and unequivocally reflects that FSP's agreement to continue negotiations at the September 3rd meeting was unconditional.

The Employer argues that this course of negotiations established that the parties were clearly at impasse. The testimony and documentation in the record amply demonstrates that the impasse in fact did exist.

The Employer argues that the issue of impasse is significantly impacted, if not disposed of by the Union's insistence on being supplied with the overall company-wide financial statements of FSP.

As indicated and argued in the FSP motion to dismiss, the Union is not entitled to financial statements at all unless the Employer pleads poverty or an inability to pay. The record clearly and unequivocally establishes that this is not the case and the Employer has never said that they had an inability to pay. "*They specifically said that they were over the budget within NLIA and they needed to make a reduction of twelve and one half percent (12½%) on all wages and monetary benefits as established in the wage reopener in the Agreement.*"

The Employer argues that if special circumstances exist, the Union has the right to demand further financial information from the Employer. Here, there has been no showing that any special circumstance existed. In other words, the Union is attempting to boot strap its request for financial information about the NLIA facility and review the Employer's company-wide financial data.

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The Employer contends that based on the largely "*undisputed record evidence and exhibits submitted into evidence, it is manifest that this case addresses only statutory interpretation and that respectfully, the arbitrator has not been granted authority under the parties' Agreement to construe the statutory law, but is restricted to the controversy arising out of the Agreement itself. Moreover, assuming arguendo that the arbitrator can determine the issues of impasse and are in compliance with NLRA's Section 8(d), the largely undisputed record evidence and authorities establish that there was a lawful impasse.*"

Accordingly, the Employer asks that the grievance be dismissed in its entirety.

For the Union

The Union argues that the grievance submitted on September 21, 2004, on behalf of all bargaining unit members is arbitrable. The Agreement between the Union and the Employer contains a very broad grievance and arbitration clause.

Article 4, Section 1 specifically provides:

> "*Any controversy, claim, dispute or grievance arising between the Company and the Union or any employee involving or concerning the meaning, interpretation, operation or application of any clause of this Agreement, or by a breach or threatened*

breach of disagreement, shall be settled in the following manner . . ."

Considering the breadth of the grievance clause, which includes alleged breaches of the collective bargaining agreement, the arbitrator is empowered to determine arbitrability and determine that this grievance concerning a unilateral implementation of a wage decrease was a breach of the collective bargaining agreement.

In support of this position, the Union references U.S. Supreme Court decision *United Steelworkers of America v. Warrior Gulf Navigation Co.*, 363 U.S. 574, 582-583, 880 S.Ct. 1347, 4 L.Ed.2d 1409 (1960) which states:

> "*In order to arbitrate, the particular grievance should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. That should be resolved in favor of coverage. Absent an express provision excluding a particular grievance from arbitration or the most forceful evidence of a purpose to exclude the claim . . . the matter should go to arbitration.*"

The Union asserts that arbitration is the *quid pro quo* for not being able to strike during the wage reopener

period. The Union argues that the language of the wage reopener found in Article 32 specifically states that:

> *"It is further agreed that during the periods of the reopener, the no-strike, no-lockout provisions of this Agreement shall remain in full force and effect as shall all other non-monetary terms and conditions thereof."*

In the normal case where there is a wage reopener, at the conclusion of negotiations and impasse is reached, the Union would then be free to engage in a strike. However, based upon the above-referenced language, the Union was not able to engage in a strike because a no-strike clause remained in effect during the period of the reopener.

The Union's letter of September 3, 2004, indicated that it *"believed that it had the right to strike at the implementation of the wage decrease. The Union contends that the Employer's argument is misplaced that they would be precluded from engaging in a strike when the Company implemented its wage decrease."*

The Union contends that the *quid pro quo* for any no-strike or no-lockout provision is arbitration, which clearly places the instant dispute within the arbitrator's jurisdiction to determine the appropriate wage reopener.

The Union argues that the fact that it filed an unfair labor practice with the National Labor Relations Board

concerning the Employer's unilateral implementation of the wage decrease and then subsequently withdrew same, does not constitute a waiver or an estoppel of arbitration.

The Union contends that the filing of an unfair labor practice charge against the Employer does not abrogate the right of arbitration of a dispute under a collective bargaining agreement.

The Arbitrator has jurisdiction over a grievance relating to the amount of wages due employees under alleged promise by the Employer, despite the fact that a charge of a violation of the NLRA by the Employer was filed with the NLRB, where the Board has dismissed the charge on the ground that the alleged violation occurred more than six (6) months prior to the filing of the charge; moreover, the subject of the dispute involves an issue that by its nature does not fall peculiarly within the province of the NLRB.

The Union contends that when a "*Union files with the NLRB with a claim that an Employer has refused to bargain a mandatory subject of bargaining, the normal practice of the NLRB is to defer the matter to arbitration. The Union argues that most parties, in the interest of settling their dispute as speedily and efficiently as possible, choose to by-pass the NLRB and place the matter before an Arbitrator.*"

The Union references a series of cases where arbitrators have determined that an employer has

breached the collective bargaining agreement by unilaterally implementing a change to a mandatory subject of bargaining.

The Union strongly argues that the "*Employer failed to bargain in good faith, improperly declared impasse and improperly implemented a wage reduction in bad faith. The Union argues that they are not asking the Arbitrator to find that the Company engaged in a violation of the NLRA, they willingly concede that is within the exclusive jurisdiction of the NLRB. However, even though a matter may be deemed to be an unfair labor practice charge within the scope of the NLRB, the Arbitrator has the authority to address a unilateral implementation concerning a mandatory subject of bargaining that is part of the collective bargaining agreement.*"

The Union agrees the Arbitrator must first turn to the Agreement itself. However, the Arbitrator may refer to external law to supplement if contract ambiguities or uncertainties arise. Bad faith in bargaining must be inferred from a party's conduct at or away from the bargaining table. The Union argues that it is well settled that unilateral decisions made by an Employer during the course of a collective bargaining relationship concerning matters that are mandatory subjects of bargaining are regarded as *per se* refusals to bargain.

The Union references the fact that the duty to bargain in good faith does not mean that an agreement must be reached. In citing NLRB cases developing labor

law and other citations, the Union agrees that where bargaining to impasse fails to produce an agreement on a matter, management is privileged to take unilateral action consistent with its proposals in bargaining. To that extent, the "*Union contends that the existence or non-existence of impasse is normally put in issue when, after negotiations have been carried on for a period of time, the positions of the parties become fairly fixed and talks reach a point of stalemate. Therefore, before an employer may lawfully make unilateral changes, impasse must exist. Impasse, according to the Union, occurs after good-faith negotiations have exhausted the prospects of concluding an agreement.*"

In the matter at bar, at best, the parties met for two (2) hours. There was a meeting on July 20, 2004, wherein the Union gave its proposals. There was a meeting on August 3, 2004, wherein the Employer rejected the Union's proposal and discussed items, including a need to reduce costs, but made no counter-proposal.

The Union strongly argues that it was the consensus of both Local 723 and FSP that negotiations be held in abeyance until mid-September to find out whether FSP would have continued in the bid as the contract for the parking services at NLIA. In support of this, the Union references the testimony of Mr. Oldam, the Regional Manager of FSP, who specifically testified that he anticipated negotiations to be face-to-face. Additionally, he admitted that FSP did not make a counter-proposal at the August 3, 2004, meeting, that he anticipated that

the next meeting would be face-to-face negotiations in mid-September of 2004.

The Union argues that Instead of that occurring, counsel for the Employer, through correspondence, attempted to negotiate a wage reduction of twelve and one half percent (12½%) on all monetary benefits. The Union refused to bargain via correspondence. Moreover, the Union demanded financial information, which FSP refused to provide.

Regardless of how this matter is viewed, the Union strenuously argues that there was no bargaining concerning the Company's twelve and one half percent (12½%) counter-proposal.

The Company, by letter dated September 2, 2004, declared an impasse, even though there was no bargaining. The Company then, on September 17, 2004, implemented a twelve and one half percent (12½%) reduction on wages only. That was not what the Company proposed. The Company only impacted those employees who were making more than $9.00. That was not proposed. The wage reduction that FSP implemented on September 17, 2004, was greater than the wage increase that they had provided to the employees for their collective bargaining agreement for the first two (2) years of the collective bargaining agreement. In fact, it reduced the wages below the rates that were established when FSP came into the facility in August of 2002.

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The Union contends that FSP improperly declared impasse on this matter and unilaterally implemented the wage reduction.

Additionally, the Union argues that FSP has engaged in bad faith bargaining and implemented the wage reduction in bad faith.

The Union argues that the notice sent to the Employer on June 18, 2004, for a reopener for August 1, 2004, was not within the sixty (60) day notice as established in Article 32 of the Agreement. The Union contends, "*It is a maxim of contract interpretation that the language which is clear and unequivocal must be given effect even though the parties may disagree as to its meaning. The parties to a contract are charged with full knowledge of its provisions and the significance of its language. Thus, unambiguous language must be enforced even if the result is contrary to the expectation of one of the parties.*"

The Union argues that their notice was defective and, furthermore, no notice was provided to either the New Jersey State Board of Mediation or the Federal Mediation and Conciliation Service. Clearly, the notice was defective and negotiations for reopener should not have occurred.

The Union argues that the grievance was timely filed and that arbitrators have held that one cannot expect to file a grievance until one is aware of the action upon which the grievance is based. In this respect, the Union

argues that a party sometimes announces its intention, "*To do a given act, but does not do so or culminate the act until a later date. In such situations, arbitrators have held that the occurrence, for purposes of applying the time limits, is the date upon which the action is actually taken.*"

The Union argues that even though there were announcements in the correspondence of August of 2002 of FSP's intent to reduce monetary benefits by twelve and one half percent (12½%) across-the-board, it is not until September 17, 2004, when they actually reduced the wages. At that point in time the incident occurred giving rise to the filing of the grievance.

The Union argues that the Employer had ample opportunity to challenge arbitrability through the grievance steps but did not do so until the hearing. While there is no specific contract language on this point, the Union contends that it is "*a well-established principle in similar circumstances that the failure to raise the arbitrability issue until the hearing is a waiver of that argument. The Union argues that most arbitrators rule that a Company's failure promptly to object to the lack of timeliness, and indeed the Company going forward with the grievance procedure amounts to a waiver of the procedural time requirements.*" Thus, any argument concerning arbitrability or untimeliness must be deemed waived because it was not raised prior to the hearing.

The Union argues that the instant matter should be deemed a class action in a continuing grievance. The

grievance was filed on behalf of the entire bargaining unit that was affected by this wage decrease, except for those who are making $9.00 or less as new hires. The Union contends that the wage decrease implemented was discriminatory because it only impacted upon those Union members who were employed with FSP when the original collective bargaining agreement was negotiated in August of 2002. Moreover, the Union strongly argues that FSP never proposed to impact only those wage earners making more than $9.00 per hour. The Employer's proposal was an across-the-board decrease for all members of the bargaining unit.

The Union argues that the matter at bar is a continuing grievance. It is the Union's position that every day that FSP continues to pay the decreased wage rate, it is violating the collective bargaining agreement. Thus, the grievance is a continuing grievance. The Union argues that the instant matter applies to all affected employees, who were, or are, employed by FSP from September 5, 2004 to the present.

The Union contends that the Arbitrator has a remedial authority to grant damages. The Union suggests that empowering the Arbitrator to resolve disputes, the parties are generally considered to have given authority to grant adequate monetary relief for contract violations where the Arbitrator finds the grievance has merit, even though the contract does not specifically authorize that remedy.

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Monetary damages in arbitration normally correspond to specific monetary losses. Make whole awards may include recovery of lost wages. Compensatory awards have also been used where an employer unilaterally institutes changes to the terms and conditions of employment or in the benefits established by the Agreement, or where an employee improperly subcontracts or contracts out bargaining unit work.

The principle that empowered the "*Arbitrator to resolve disputes cloaks the Arbitrator with the authority to make the aggrieved party whole has been well established by arbitrable precedent as far back as 1974. To restrict arbitrators to remedies specifically set forth in a contract would negate arbitration as a method of dispute settlement or result in cluttering contracts with numerous liquidated damage provisions that would invite more trouble than they would prevent. Even though the contract is silent, the arbitrator has the authority to award monetary damages to employees for FSP's breach of the Agreement.*"

The Union contends that the Employer's transcribed notes from the July 20, 2004, meeting and the August 3, 2004, meeting must be dismissed. There was no tape recording in the negotiations conference room to the Union's knowledge. The Union did not authorize a tape recording at the negotiation sessions. The idea that there are notes that are being transcribed is disturbing to the Union.

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The Union argues that the Employers counsel has submitted his notes as part of its motion to dismiss. "*Those notes do not indicate whose notes they are and they do not indicate that they were made contemporaneously. There was no testimony offered at the hearing concerning the notes. There was no motion by FSP during the hearing for the admission of those notes as evidence.*"

The Union contends that while the "*Arbitrator has great leeway regarding granting applications for submission of evidence – it is clear that without any foundation laid as to who took the notes, whether or not they were made contemporaneously, and how they were transcribed and from what – questions are raised as to the content and accuracy of the information and statements contained in those notes. The Union argues that the notes submitted are merely self-serving statements that could have been created long after the actual meetings. Moreover, the actual notes were not produced to verify the accuracy of the transcribed notes. Accordingly, the Union objects to those transcribed notes of the negotiating sessions.*"

By way of relief, the Union asks that the grievance should be granted in its entirety. FSP should be ordered to immediately cease and desist from paying the decreased wage rate, which became effective September 17, 2004. All employees' wages that were affected, including those employees who have left employment since the effective date, should be restored to the rate they were prior to September 17, 2004. The Arbitrator

should award back pay to each of these employees for the full amount from September 5, 2004, to the date that FSP actually gives the employees the award of back pay. The Arbitrator should order interest on the back pay amounts.

It is specifically requested that the Arbitrator retain jurisdiction should there be a dispute concerning the calculation of the back pay award and who may be entitled to same.

DISCUSSION AND OPINION

As is typically the case in an issue that deals with contract interpretation, both parties insist that the language is clear and unambiguous, but disagree as to the meaning of that clear and unambiguous language.

In the instant matter, the Employer has raised the issue that the Arbitrator is being asked to interpret and apply the NLRA. In that context, FSP argues that under the terms of the Agreement the Arbitrator is not authorized to rule on that subject matter. Accordingly, the Employer strongly argues that the Arbitrator cannot issue an award that would draw its essence from the Agreement.

To determine if the Agreement grants the Arbitrator any authority in the instant matter, it is necessary and appropriate to review the definition of a grievance as found in Article 4, Section 1. That provision states:

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> *"Any controversy, claim, dispute or grievance arising between the Company and the Union or any employee, involving or concerning the meaning, interpretation, operation or application of any clause of this Agreement, or by any breach or threatened breach of this Agreement shall be settled in the following manner . . ."*

Additionally, Section 1(i) states:

> *"The Arbitrator shall be limited to the particular dispute in question and shall be bound and governed by the provisions of this contract and restricted to its application to the facts presented to him involved in the grievance. The Arbitrator shall not have jurisdiction or authority to add to, modify, detract from or alter in any way the provisions of this Agreement or any amendment or any supplement thereto."*

The Employer raises a novel argument that since the word impasse does not appear in the collective bargaining agreement and that the parties have not granted the Arbitrator any authority to apply or interpret the law that is applied in cases of impasse, the instant grievance must fail. The Employer has a high degree of comfort in espousing that position and pursued that argument throughout its motion to dismiss as well as in its post-hearing brief. However, a careful review of case law and the particular language in the Agreement,

clearly establishes that that comfort level has a short life expectancy.

The continued vitality of the Employer's argument concerning the Arbitrator's authority in the instant matter has been set aside by two cases decided by the United States Supreme Court. The first case, which is the seminal case within the *Steelworkers* trilogy, *Steelworkers v. Enterprise Wheel and Car Corp., supra,* clearly states the following:

> *"An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."*

The second case is *Alexander v. Gardner/Denver Co.*, 415 U.S. 36 (1974), wherein the Court, citing the trilogy observed (415 U.S. 36 at 53-54):

> *"If an arbitrable decision is based solely upon the arbitrator's view of the requirements of enacted legislation, rather than on an interpretation of the collective bargaining agreement, the 'arbitrator has exceeded the*

scope of the submission' and the award will not be enforced. Thus, the arbitrator has the authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, duplicative of, the substantive rights secured by statute."

The language of the grievance procedure referenced above **speaks of a breach or threatened breach of this Agreement, and restricts an arbitrator to apply the Agreement to the facts in evidence** clearly are controlling factors in the instant matter. (emphasis supplied)

Those highlighted words clearly mean that any action taken by the Employer with respect to any language in the Agreement or the application and interpretation of any language in the Agreement is a grievable matter subject to binding arbitration. In the instant matter, the facts presented to me as defined in Article 4, Section 1(i) clearly and unequivocally establish that I must review all of those facts to determine whether or not the contract has been violated. Regardless of the argument advanced by the Employer, I have the contractual authority, as set forth by two United States Supreme Court decisions, to determine whether or not the contract has been violated in the instant matter.

In fact, at page 3 of its post-hearing brief, in paragraph 3, the Employer states, "*Rather, he is solely bound and governed by the provisions of the*

Agreement." The determination I reach in the instant matter is governed by the definition of a grievance and the facts presented to me as defined within the grievance procedure.

The gravemen of the Union's argument is that the Employer unilaterally implemented a twelve and one half percent (12½%) wage reduction. All other issues of a statutory nature are not before me. Any argument raised as to whether or not the reopener was defective or not properly submitted is irrelevant to the proceedings before me. My only determination will be whether or not the contract was violated.

At the July 20, 2004, negotiating session, the Union submitted its wage reopener proposals in accordance with Article 32. Those proposals included a dollar per hour increase each of the remaining years of the Agreement, a reinstatement of the wage progression frozen in the second year of the Agreement, health, welfare and pension increases.

On August 3, 2004, the Employer rejected that proposal and explained its financial circumstances to the Union. On August 9, 2004, the Employer sent a three-page letter to Mr. Grossman in which they indicated their financial circumstances. They also proposed to reduce the costs associated with the collective bargaining agreement by a minimum of twelve and one half percent (12½%).

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The Union has the right to demand financial information based upon the position advanced by the Employer. The Employer argues that they do not have an inability to pay, but their circumstances at NLIA are at such a nature that they cannot continue to sustain a loss of over $1,000,000.00 per year. Moreover, the Employer strongly argues that they never agreed to hold negotiations in abeyance until it was determined if they would receive the bid to be the manager for the parking lots at NLIA.

The Union claims that the Employer did agree to hold negotiations in abeyance. Unfortunately, there is no written document to offer credence to either position that the Employer refused to hold negotiations in abeyance or, in fact, did agree to hold negotiations in abeyance. Therefore, the only thing that I can look at is the fact pattern that is before me.

The Union argued that the Employer did not implement Its proposal of a twelve and one half percent (12½%) decrease across-the-board for all wage rates, and that way only reduced the wages of employees making more than $9.00 per hour.

To that extent, the Union has a valid point. If the wage reduction proposal of the Employer was for all wage rates as referenced in its October 9, 2004, letter to Mr. Grossman, then reducing the wage rate of those making more than $9.00 per hour was disingenuous at best. Moreover, I find it extremely difficult to accept the

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Employer's argument that an impasse existed after approximately two, maybe three, hours of bargaining.

If the Employer believed that the Union exceeded its request for financial information, then the Employer had legal avenues to appeal that position of the Union. Logic dictates that if the Union agreed to the Employer's proposal of a twelve and one half percent (12½%) across-the-board wage reduction and subsequently FSP lost as the operator of the parking lots at NLIA, the Union would have been in a very precarious situation. I fully agree that the Union would not have accepted that type of position if they did not know whether or not FSP was going to continue to be the operator of the parking lots at NLIA.

Based upon all of the evidence and voluminous documentation presented by both parties, I am not convinced that an impasse existed. The fact that the Union would not agree to the Employer's wage proposal of a twelve and one half percent (12½%) reduction in the wage rates does not mean that an impasse existed. It means that the Employer had a financial situation that they were trying to stop the hemorrhaging, but they were then required to give information to the Union. The Employer only gave information to the Union for NLIA. Whether they are required to give any information beyond that is not for me to determine. What is for me to determine is whether or not the Employer's action of implementing a wage reduction breached the collective bargaining agreement.

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Based on the facts in evidence, there is no question that the Employer's action of September 17, 2004, in reducing employer's wages was violative of the collective bargaining agreement. The Union asserted that the wage reduction impacted only those employees making more than $9.00 per hour. There is no testimony in the record to substantiate that position. However, for the purpose of my Award it does not make any difference if the Employer's wage reduction was for employees making $7.00 per hour, $9.00 per hour or $10.00 per hour. The simple fact is that they reduced employees' wages without negotiations.

Think of the enormity of the instant matter. The Union proposes in accordance with the wage reopener specific proposals of an economic nature. Subsequently, the Employer makes a counter-proposal of a wage reduction. Quite frankly, that is nothing new, novel or unique in labor relations in the United States. Any Employer will be asking for wage reductions, concessions, and rollbacks. That is exactly what has been occurring for the last 10 or 15 years, especially in the areas of health insurance. Employers are constantly asking for concessions or rollbacks.

When an employer proposes a wage reduction that is agreed to by a Union that is a concession. Concessionary bargaining produces some interesting results. However, in the instant matter, the Employer never allowed the negotiations process to really move forward or to pick up steam to see where they could reach some type of common ground. They simply said, we will

not give you the additional financial information you are asking for, and if you do not show up for the September 3, 2004, negotiating session we are declaring an impasse. Accordingly, they declared the impasse and reduced the wages of the employees.

That is the most contorted definition of negotiations I have ever heard. The negotiations process is a give and take process. It is a fascinating process that has ups and downs, hills and valleys, but one that reaches resolution of the issues to be negotiated. Typically, in the private sector, when the employer takes the type of action as presented in the instant matter, Unions usually call for a strike. The Employer argued that there is a no-strike clause in the contract, and the Union has no right to go on strike.

The Employer is correct that Article 12 is a no-strike, no-lockout clause. However, whether or not the Union has the right to call for a strike because the Employer breached the Agreement is not for me to determine. That matter is not before me. What is before me is that the Employer's action breached the Agreement. I have already determined that it did.

It breached the Agreement because there was no impasse. The Employer simply said, "we are going to reduce the wages by twelve and one half percent (12½%). If you don't agree, we are going to declare an impasse and implement that wage reduction." That is not negotiations. I can't accept the limited time spent in

bargaining as a basis for the Employer's authority to reduce the wages of the bargaining unit members.

Accordingly, there is no question in my mind that the Employer's action breached the Agreement. The question becomes what type of remedy can be developed based upon the facts in the instant matter.

For the foregoing reasons and having duly heard the proofs and allegations of the parties, I Award the following:

AWARD

The grievance is sustained. The Employer's unilateral action of reducing the wages of bargaining unit members was in violation of the Agreement. Five Star Parking shall cease and desist from paying the decreased wage rate, which became effective September 17, 2004. All employees whose wages were reduced, including those who have left employment since September 17, 2004, shall be awarded back pay for the full amount of reduction of their salary that was in effect on September 5, 2004, to the day they receive their retroactive pay.

I am denying the Union's request for interest.

I shall retain jurisdiction should there be a dispute concerning the calculation of the back pay money and who may be entitled to it.

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Gerard G. Restaino
Gerard G. Restaino, Arbitrator

Dated: August 3, 2005

State of New Jersey)

County of Middlesex) ss:

On this 3rd day of August 2005, before me personally came and appeared GERARD G. RESTAINO to me known to be the person who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED AUGUST 29, 2007

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-2012

FIVE STAR PARKING

v.

UNION LOCAL 723, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Appellant

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, and HARDIMAN, *Circuit Judges*

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service

not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

MICHAEL A. CHAGARES
Circuit Judge

DATED: August 29, 2007